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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

NORMAN B. PITCAIRN AND FRANK C. NICODEMUS, JR., RECEIVERS OF THE WABASH RAILWAY COMPANY, A CORPORATION, *Petitioners,*

vs.

OLIVER S. PERRY, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING CERTIORARI

WILLIAM H. DEPARCQ,
Attorney for Respondent,
1655-60 Rand Tower,
Minneapolis, Minnesota.

Of Counsel:
SAMUEL COHEN,
139 North Clark Street,
Chicago, Illinois.
WILLIAM R. KIRBY,
COX, BLAIR & KOOREMAN,
1200 Title Guaranty Building,
St. Louis, Missouri.

Hayward Brief Co., 601-7 Fourth Ave. So., Minneapolis

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I.

PRELIMINARY STATEMENT

This is a petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals of the Eighth Circuit in the above entitled cause. The opinion is reported in 122 F. (2d) 881. The action was brought to recover damages for personal injuries and jurisdiction is predicated upon the Federal Employers' Liability Act (35 Stat. 65, Ch. 149, 45 U. S. C. A., Sec. 51-59).

The petition and brief of the petitioners are so confusing and misleading and contain such a biased partial summary of the evidence as to require a more accurate statement of the essential facts. Petitioners are either unable or unwilling to view the facts in their aspect most favorable to respondent and to allow the latter the benefit of reasonable

inferences deducible therefrom and to recognize that questions of the weight and credibility of testimony are for the jury.

In fact, the application of petitioners is conspicuous for obscuring and minimizing the importance of the vital and determinative facts and emphasizing those of purely collateral import. It is necessary, therefore, to present with appropriate brevity the true and correct picture.

At the outset it should be understood that there is no genuine dispute here involved about legal principles. There is no important principle of law at stake. The principles of law that govern this controversy are clear, undisputed and thoroughly established.

The Question Involved.

The simple question in this case is whether the evidence, tested in the light of principles that are clear and undisputed, was sufficient to warrant the application of *res ipsa loquitur.*

The case resolves around the facts and the evidence exclusively. Simply stated, the sole issue is: Does the factual background invoke the application of the doctrine of *res ipsa loquitur?* The Court below said (R. 477):

> "As defendants' motion for a directed verdict is not contained in the record, we have no way of determining the grounds upon which they predicate that motion, and hence, defendants can not here urge that its denial was prejudicial."

Later in the opinion it was said (R. 481):

> "As previously noted, the record is such that we cannot consider the question of the sufficiency of the evidence but may only consider it in connection with exceptions to the instructions."

We propose to demonstrate in this brief that:

First: No special and important reasons exist that would warrant the issuance of a writ.

Second: There is no federal question of substance involved unless the sufficiency of the evidence to invoke *res ipsa* in every case under the Federal Employers' Liability Act is to be so considered.

Third: The legal principles involved are not in need of alteration or redefinition.

Fourth: And lastly, that the abstract principles of law were properly interpreted and applied to the case at bar by the Circuit Court of Appeals.

Instead of repeating the entire background, we will assume that the members of this Court are familiar with the facts stated clearly and accurately in the opinion below (R. 473-476), and our statement of facts will be supplementary only.

II.

STATEMENT OF FACTS

At about 10:30 P. M., on July 12, 1939, in the yards of petitioners at Moberly, Missouri, it was discovered that a door on a freight car was open. Certain employees had attempted to close the door at a station seven miles west of there but were unsuccessful. The respondent, a car inspector, was assisting three other employees of the petitioners, who were pulling and pushing with their hands in attempting to close this door, when it fell from its fastenings and injured him.

The construction of a car door is such that it cannot come off and fall down unless it is defective. If the door and the attachments are in good condition, a car door will not come off because an employee pries under it with a crowbar, but this will have a tendency to keep it on (R. 63, 66, 67, 272).

Unless the track or the hangers are in bad condition—in fact, unless the wood is so rotten or the bolts so defective as to permit an inch and an eighth (R. 139), or an inch and a quarter (R. 159) of slack, the metal pieces at the top will not disengage (R. 64, 65, 70, 118, 138, 157). This is because of the nature of the metal strips that engage each other at the top and prevent the door from coming out (R. 65). They are three-sixteenths or one-quarter of an inch thick (R. 118). If in good condition, a man cannot break them by prying up with a crowbar at the bottom (R. 70, 118). Either rotten wood or corroded metal would be necessary to permit the door to come off (R. 63-6, 138-9, 157).

A number of employees with twenty-nine and thirty years of experience testified they had never had a car door come off when they were prying upon it with a crowbar, even though the roller would seem to be off at the top (R. 49, 51, 55, 56, 70-1). One good hanger would be enough to keep it on (R. 77-8).

Car doors frequently stick because of being wet, or bulging, or there may be particles of coal or cinders or wood in the hangers or rollers or on the track (R. 49, 59, 77, 191-2). When they stick, it is customary practice for employees to use a crowbar to jar them loose, and the company supplies such a bar for this very purpose (R. 44, 65, 146, 186). By placing the bar underneath and working it up a little, you will release it at the top and permit the door to close (R. 145).

On the occasion in question respondent was using a crowbar and he had pried upwards and was holding the door, while the other three employees were pulling and pushing upon it with their hands. He was using the bar in exactly the same way that he and other employees had been using it for eighteen years without trouble or accidents (R. 146-7). When he took the slack up, he stopped and did not exert any

other pressure (R. 275-6, 364). His testimony that he merely held the bar in place and did not keep on prying was undisputed (R. 157-8, 275-6, 364). There was no visible sagging at the bottom (R. 190) and neither respondent nor any of the other employees believed there was any possibility of an accident (R. 189, 355-6).

The car doors, and particularly the hangers and equipment at the top, are inspected at originating terminals like Kansas City, where the train started that morning, and not at intermediate points like Moberly. At originating terminals they have special equipment and special employees for that purpose (R. 103, 124, 136, 205).

At Moberly the car inspectors made only running inspections (R. 124). A half minute would be allotted to each car in the train for the entire inspection of couplers, wheels, brakes, grabirons, sillsteps and brake rigging (R. 62, 128-9, 133). Car inspectors do not inspect car hangers and the equipment at the top of doors (129, 133, 136, 345).

The co-inspector, Bell, who was working with Perry that night and assisting in the closing of the door, testified (R. 345):

> "Q. Now, was this car door or its various parts or attachments defective?
> A. Not that I know of. I did not examine it.
> Q. Did you make any inquiry to find out?
> A. No, sir.
> Q. Was it your duty to find out?
> A. No.
> Q. Are your duties the same as Perry's?
> A. Yes, sir."

Immediately after the accident respondent was carried to the ambulance in a stretcher and, of course, as he testified: "I never had an opportunity to inspect it after the accident happened" (R. 202).

Throughout petitioners' brief it is stated that there was

no evidence that the car door was defective. This statement is false. Further, it is unjustifiably so. Plaintiff's Exhibit 2 (R. 95) is the record of repairs made on the car involved in the accident. The record shows that two completely new doors were made because of the decayed condition of the old ones, and it shows that the other two doors were removed, repaired, and replaced, also on account of their decayed condition. It shows that a considerable number of bolts were "spoiled" which, according to the employee who made the record, is "liable to mean anything, maybe worn out, rusted out" (R. 320). A completely new running board was placed on the car because the old one was decayed (R. 95). The general car foreman inspected the car the next day and found that the accident was caused because the roller was worn and the hanger casting cracked on the inside (R. 196). He stated that the roller was worn enough to permit the door to disengage (R. 206). He made a report to this effect and signed it (R. 196-7). Although the car foreman was still in the employ of the company (R. 130) at St. Louis, where the case was tried (R. 99), he was not produced as a witness, and his absence was unexplained.

The petitioners immediately took possession of the car and issued instructions not to bother or disturb it (R. 99). The car was held on the rip track for the claim agents (R. 99, 328-30, 116). Two claim agents were on the job within a day or two after the accident, and petitioners and their employees had control of the instrumentality of injury (R. 330, 116, 369, 71).

Before the accident occurred, one of the group of four employees who were closing the door, patrolman Smith, climbed up on top of the car and flashed his light there; a hammer was thrown up to him, and he tapped the back of the rollers (R. 142-3). When Smith came down from the top of the car nothing was said about the door being defective, the pieces

of metal being disengaged, the hangers being off the track, or anything of the kind (R. 156, 183). He made no comment (R. 190). It was the duty and custom of these special patrolmen as well as car inspectors to close doors (R. 133). Bell and respondent, both inspectors, were co-equal in authority, and neither had the right to give orders to the other (R. 341).

At the trial Smith claimed that one of the hangers was off the track, but admitted it was something you couldn't possibly see from the ground and said it was not way out at the top and there was not a space between the door (R. 363). It was not part of respondent's duty to inspect the tops of the doors or the hangers and attachments on the doors (R. 133). It would not be customary but would be unusual to get on top to do so (R. 76, 129). You couldn't tell from the ground even with a light that any wheel was off the track (R. 73).

Petitioners' witness Smith, whose hands were on the door at the time, would not say that respondent was exerting any force or pressure on it at all. He testified (R. 364):

> "Q. In other words, from anything you could feel with your hands or from anything you could see, you don't know whether he was actually exerting pressure or not?
>
> A. No, sir.
>
> Q. All you know is that Bell was pulling and you pushing and Perry stood there with the bar?
>
> A. Yes, sir.
>
> Q. Beyond that you can't tell us?
>
> A. No, sir."

Upon the trial petitioners did not produce the general car foreman who made the inspection of the car to determine the cause of the accident, nor did they produce their blue prints, photographs, records, or any other evidence of a credible nature to explain the occurrence. The defense was a purely

technical one based upon obstruction and concealment; it was not based on any genuine claim of non-liability, but upon the contention that the plaintiff was unable to establish the true facts.

The testimony of those witnesses which were produced by the petitioners was so contradictory and so badly impeached and so inconsistent with previous sworn depositions that the trial court and the jury would be justified in rejecting it entirely. We refer especially to the testimony of the witness Archer (R. 322-336) whose demolition was complete.

III.

POINTS AND AUTHORITIES

1.

The Doctrine of Res Ipsa Loquitur Applies in Actions Under the Federal Employers' Liability Act.

Southern Ry. Co. vs. Bennett, 233 U. S. 80, 34 S. Ct. 566.

Delaware, L. & W. R. Co. vs. Hughes, 240 F. 941.

Central R. Co. vs. Peluso, 286 F. 661 (Cert. Den. 261 U. S. 613, 43 S. Ct. 359).

Erie R. Co. vs. Murphy, 9 F. (2d) 525.

Schroble vs. LeHigh Valley R. Co., 62 F. (2d) 993.

Delaware & H. Co. vs. Dix, 188 F. 901.

Philadelphia & R. Ry. Co. vs. Eisenhart, 280 F. 271.

Altman vs. Atlantic Coast Line R. Co., 18 F. (2d) 405.

Baltimore & O. R. Co. vs. Kast, 299 F. 419.

Cochran vs. Pittsburgh & L. E. R. Co., 31 F. (2d) 769.

Didinger vs. Pennsylvania R. Co., 39 F. (2d) 798.

Chesapeake & Ohio R. Co. vs. Smith, 42 F. (2d) 111.

Detroit, T. & I. R. Co. vs. Hahn, 47 F. (2d) 59.

Carpenter vs. B. & O. R. Co. (6 Cir.), 109 F. (2d) 375.

Lowery v. Hocking Valley Ry. Co., 60 F. (2d) 78.
Larussi vs. Missouri Pac. Ry. Co., 155 F. 654.
Missouri Pac. Ry. Co. vs. Larussi, 161 F. 66.
Leathem Smith-Putnam Navigation Co. vs. Osby, 79 F. (2d) 280.
Eker vs. Pettibone, 110 F. (2d) 451.
Terminal Railroad Assn. vs. Staengel, 122 F. (2d) 271.

2.

The Evidence Was Sufficient to Justify the Trial Court in Submitting the Case to the Jury Under the Doctrine of Res Ipsa Loquitur.

a. Cases directly in point.

Cork vs. LeHigh Valley R. Co., 98 N. J. 143, 119 Atl. 88.
Smith vs. St. Louis & S. F. Ry. Co., 95 Kan. 451, 148 Pac. 759.
Rhodes vs. Southern Ry. Co., 188 S. C. 228, 198 S. E. 382.
Pennsylvania R. Co. vs. Hummel, 167 F. 89.
Black vs. St. Joseph & Grand Island Ry. Co., 159 Mo. App. 405.
Louisville & N. R. Co. vs. Burch, 155 Ky. 245, 159 S. W. 782.

b. Cases analogous to the one at bar.

Central R. Co. vs. Peluso (2 Cir.), 286 F. 661 (Cert. Den. 261 U. S. 613, 43 S. Ct. 359).
Eker vs. Pettibone (7 Cir.), 110 F. (2d) 451.
American Car & Foundry Co. vs. Barry (8 Cir.), 195 F. 919.
Peterson vs. Minnesota Power & Light Co., 207 Minn. 387, 291 N. W. 705.

Goldman & Frieman Bottling Co. vs. Sindell, 140 Md. 488, 117 Atl. 866.

Pandjiris vs. Oliver Cadillac Co., 339 Mo. 711, 98 S. W. (2d) 973.

Jenkins vs. Kansas City, 230 Mo. App. 337, 91 S. W. (2d) 98.

McCloskey vs. Koplar, 329 Mo. 527, 46 S. W. (2d) 557.

Thornton vs. Van de Kamps Holland Dutch Bakers, 181 Wash. 213, 42 Pac. (2d) 799.

c. The non-production of available evidence warrants the inference that it would have been unfavorable.

Futrell vs. Arkansas-Missouri Power Corp., 104 F. (2d) 752.

Sears, Roebuck & Co. vs. Peterson, 76 F. (2d) 243.

Leonard vs. St. Joseph Lead Co., 75 F. (2d) 390.

Lincoln Nat. Life Ins. Co. vs. Erickson, 42 F. (2d) 997.

Malouff vs. Pope, 9 F. (2d) 254.

Hill vs. United States, 234 F. 39.

1 *Wigmore, Evidence* (2d Ed.), 285-291.

1 *Jones, Evidence* (2d Ed.), 89.

22 *C. J.,* p. 115, Sec. 56.

Dec. Dig., Trial, 211, 234 (8).

10 *R. C. L.* 884, Sec. 32.

3.

The Questions of Contributory Negligence and Assumption of Risk Were Properly Submitted to the Jury.

Kanawha & M. R. Co. vs. Kerse, 239 U. S. 576.

Texas & Pac. R. R. Co. vs. Archibald, 170 U. S. 665.

C., R. I. & P. Ry. Co. vs. Ward, 252 U. S. 18.

Ches. & O. R. Co. vs. Proffit, 241 U. S. 462.

Schlemmer vs. Buffalo, P. & P. R. Co., 205 U. S. 1.

Missouri Pac. R. Co. vs. Siratt (8 Cir.), 78 F. (2d) 253.

Davis vs. Crane (8 Cir.), 12 F. (2d) 355.

Northern Pac. Ry. Co. vs. Berren (9 Cir.), 73 F. (2d) 687.

Birmingham Belt R. Co. vs. Dunlap (5 Cir.), 58 F. (2d) 951.

C., N. O. & T. P. Ry. Co. vs. Thompson (6 Cir.), 236 F. 1.

Cross vs. C., B. & Q. R. Co., 191 Mo. App. 202, 186 S. W. 1130.

IV.

ARGUMENT

Prefatory Statement.

In deference to the rule of this Court requiring the abbreviation of briefs, no attempt will be made to follow the confused and unnecessarily extended argument of the petitioners. We shall not seek to overwhelm the Court with the citation of a very plethora of authorities, nor shall we burden the members of this Court with quotations from ancient cases whose doctrines have long since been discarded.

1.

The Doctrine of Res Ipsa Loquitur Applies to the Present Action.

At common law the fellow-servant doctrine prevented the application of *res ipsa* to the master and servant relationship. This ancient rule still obtains in actions at common law such as many of those referred to and quoted from in petitioners' brief. Where the fellow-servant doctrine has been abolished, and particularly when contributory negligence is no longer a complete defense, the obstacle to the application of *res ipsa* is taken away.

When the Federal Employers' Liability Act was adopted, it specifically abrogated the fellow-servant rule and, further, it expressly adopted the rule of comparative negligence, so that contributory negligence no longer constituted a bar to the action but went only in diminution of damages. As said in *Leathem Smith-Putnam Navigation Co. vs. Osby* (7 Cir.), 79 F. (2d) 284 (Cert. Den. 296 U. S. 653):

> "By the Federal Employers' Liability Act, which governs here, the defenses based upon the fellow-servant rule and contributory negligence have been abolished except that the latter may mitigate damages. Consequently, the doctrine of *res ipsa loquitur*, is unhampered in its application."

So, also, in *Carpenter vs. B. & O. R. Co.* (6 Cir.), 109 F. (2d) 375, it was said:

> "In view of the fact that the Employers' Liability Act abrogated the common law fellow-servant rule by placing negligence of a co-employe upon the same basis as negligence of the employer, in our opinion the falling of the weight under the circumstances of this case in itself was some substantial evidence of negligence on the part of appellee."

Exactly the same result was reached in *Central R. Co. vs. Peluso* (2 Cir.), 286 F. 661, and in the course of the opinion it was expressly stated that this Court had left unimpaired the doctrine of *res ipsa* as between employer and employee where the circumstances warranted it. Your Honors denied a writ of certiorari in 261 U. S. 613. In *Baltimore & O. R. Co. vs. Kast*, 299 F. 419, where the same subject was involved, the Court noted that a petition for certiorari in the *Peluso* case based solely upon the ground involved in the case at bar was denied. Having denied the writ in the *Osby* and *Peluso* cases, there is no occasion for the issuance of one in the case at bar.

In fact, there is no confusion on this subject at all. The decisions in the various circuits are perfectly uniform, and

counsel have been unable to cite a single decision in the Federal courts where it has been held that the doctrine cannot be applied under the Federal Employers' Liability Act. One of the most recent decisions wherein *res ipsa* was applied in such a case is *Eker vs. Pettibone* (7 Cir.), 110 F. (2d) 451, which is applicable here on the merits as well as upon general principles.

Typical of the decisions relied upon by petitioners is *Patton vs. Texas & Pac. Ry. Co.*, 179 U. S. 658, which was tried forty years ago and long before the passage of either the Employers' Liability Act or the Safety Appliance Act. The fellow-servant doctrine was then in full force and effect. Patton was barred from recovery by contributory negligence, which was then a complete defense. In sustaining the decision of the two lower courts, the Supreme Court remarked that while an accident itself might carry a presumption of negligence as to a passenger of a carrier, it does not do so as to an employee. The *Patton* case has been later distinguished by this Court and other courts throughout the country, and while it contained a sound exposition of the law at the date of its decision, it is not authority for the view that *res ipsa* can never apply between master and servant.

In fact, decisive and controlling on this phase of the controversy is *Southern Ry. Co. vs. Bennett*, 233 U. S. 80. In an action under the Federal Act it appeared that the deceased was killed when his engine fell through a burning trestle. The trial court instructed the jury that where a servant is injured through defective instrumentalities, it is *prima facie* evidence of the master's negligence, and that the master assumes the burden of showing that he exercised due care in furnishing them. In sustaining the judgment for plaintiff and in holding that this instruction was not reversible error, this Court said:

"Of course, the burden of proving negligence in a strict sense is on the plaintiff throughout, as was recognized and stated later in the charge. The phrase picked out for criticism did not controvert that proposition, but merely expressed in an untechnical way that, if the death was due to a defective instrumentality and no explanation was given, the plaintiff had sustained the burden. The instruction is criticised further as if the Judge had said *res ipsa loquitur*—which would have been right or wrong according to the *res* referred to. The Judge did not say that the fall of the engine was enough, but that proof of a defect in appliances which the company was bound to use care to keep in order, and which usually would be in order if due care was taken, was *prima facie* evidence of neglect. The instruction concerned conditions likely to have existed for some time (defective ash pan or damper on the engine and rotten wood likely to take fire), about which the company had better means of information than the plaintiff, and concerning which it offered precise evidence, which, however, did not satisfy the jury."

In the case at bar there was undisputed evidence of defective appliances which the master was bound to use due care to keep in order, and which usually would be in order if the employees at originating terminals and on the rip track had exercised due care. The defects, rotten wood and corroded metal, were of a nature to imply negligence because those under a duty to use care to keep wood and metal in reasonably safe condition are charged with notice of the tendency of the one to decay and the other to corrode.

2.

The Evidence Was Sufficient to Warrant the Submission of the Case to the Jury Under Res Ipsa Loquitur.

We shall not confuse respondent's alleged duty, if any, to discover the defect, that is, his contributory negligence, or his knowledge and appreciation thereof, that is, assumption of risk, with the question of defendants' negligence. The other two subjects will be discussed under the appropriate heading, and we are now concerned only with the evidence of defendants' negligence.

It was clearly established that a defective condition existed of a nature to have continued over a considerable period of time. It was established that defendants maintained employees and special equipment to discover and remedy this type of defect. It was further established that in the experience of employees extending over thirty years an accident of this type had never happened and could never happen without such a defective condition. The car door was at all times in the possession and control of petitioners, both before and after the accident. Respondent's conduct had no causal connection with the accident. He was exerting no control over the instrumentality that could have caused it to fall.

Respondent was only one member of a group of four who were co-equal in authority and in the performance of duty. If, contrary to the actual fact, it be assumed that he was exerting force and pressure, then so were the other employees, and at least three-fourths of the control and three-fourths of the negligence, if it be such to perform their duty, was attributable to petitioners. The petitioners took possession of the car door after the accident and retained such possession and control at all times until the trial. They did not produce in court the offending instrumentality.

They had exclusive means of information to ascertain the precise defect, and they had exclusive access to the evidence with respect to the cause of the accident.

The trial judge carefully conditioned the application of *res ipsa* upon the following findings (R. 450-2):

1. That the car door would not have fallen if it had been in good repair.

2. That the defective condition of the door caused it to fall.

3. That the means of knowing the defect was exclusively and entirely within the knowledge and control of defendants and was not known by plaintiff or readily determinable by him.

4. That the door would not have fallen except for the negligence of the defendants.

5. That the act of the plaintiff was not the proximate cause of the door falling.

This is not only sound law but is consonant with fairness and justice.

Petitioners' counsel should not permit their zeal to control their veracity. We have shown that their statement that there was no defect in the car door is wholly unfounded and that, in truth and in fact, the repair records and the oral and written admission of Poffenberger, the general car foreman, establish both rotten wood and defective metal as the cause of the accident. The admission of the general car foreman is substantive evidence.

See *Chicago, St. P., M. & O. R. Co. vs. Kulp*, 102 F. (2d) 352 (Cert. Den. 307 U. S. 636).

It should be noted that respondent had less control over the door that injured him than did Peluso over the crane which overturned on him. Because the jury found that

Peluso's acts did not cause the crane to overturn, *res ipsa loquitur* applied in that case, and because the jury has found that respondent's acts did not contribute to the occurrence of the accident, *res ipsa loquitur* applies in this case. In *Eker vs. Pettibone* (7 Cir.), 110 F. (2d) 451, where an engineer was killed by the derailment of his engine, but it was shown that it was not his speed or control which caused the accident, in rejecting petitioner's argument, it was said:

> "True, the decedent, as the engineer, had control of the speed of the engine, but he had no more control and was no more responsible for the proper functioning of the pony trucks, which caused the accident, than was the fireman, brakeman or conductor."

In many cases it has been pointed out that control does not mean actual physical control at the moment of the accident but refers to control and the right of control *at the time the negligence was committed.* The car door was in defendants' control for days, weeks and months before the accident, and this was when the defective condition was slowly occurring by reason of negligence. The overwhelming majority of the courts have rejected the rigid concept of control and have adopted the more reasonable rule that ownership, possession and control at the time of the negligence is the vital factor.

The bald statement that it is undisputed that respondent had actual physical control of the door is unwarranted. The other three employees were actually doing the pushing and pulling at the time of the accident, and respondent merely held the bar in place (R. 158, 275-6, 364).

The claim that petitioners had no means of knowledge concerning the condition of the door is obviously untrue. They had possession of it both before and after the accident. They inspected it, probably photographed it, repaired it, and had the most full and complete access to the door, the hanger,

the track and all the other equipment. The authorities all agree that a very important factor is the possession of superior knowledge and evidence concerning the cause of the accident.

In support of these statements we direct attention particularly to:

Eker vs. Pettibone (7 Cir.), 110 F. (2d) 451.

Peterson vs. Minnesota Power & Light Co., 207 Minn. 387, 291 N. W. 705.

Pandjiris vs. Oliver Cadillac Co., 339 Mo. 711, 98 S. W. (2d) 973.

Central R. Co. vs. Peluso (2 Cir.), 286 F. 661 (Cert. Den. 261 U. S. 613).

I. C. R. R. vs. Brickett, 109 Ill. App. 468, 474.

We forbear discussion of those cases which are directly in point and which will be found under point 2, subdivision a, on page 9 of this brief, but we note with interest that the court below cited, relied upon, and quoted from the *Cork* case from New Jersey and the *Smith* case from Kansas, both of which are on all fours with the case at bar.

The case of *Copeland vs. Chicago, B. & Q. R. Co.*, 293 F. 12, relied upon by petitioners, did not involve the doctrine of *res ipsa loquitur*. The complaint in that case alleged specific allegations of negligence. Having pleaded negligence specifically, it was up to the plaintiff to prove it specifically. The case involved only the sufficiency of the evidence to establish specific negligence, with which we are not here concerned. The *Copeland* case is otherwise distinguishable. It involved a charge of negligent inspection, and the only railroad companies sued were connecting and delivering carriers. The owning carrier was not joined. As to connecting and delivering carriers, one of whom had possession of the car only for a few hours, it was held there could be no negligence in failing to discover a latent and hidden defect.

Each case cited by petitioners in the argument is distinguishable. The quotation from Judge Woodrough's opinion in *F. W. Martin & Co. vs. Cobb*, 110 F. (2d) 159, had reference to a case under the common law of Arkansas and not under the Federal Employers' Liability Act. So, also, the statement of Judge Sanborn from the case of *Northern Pac. Ry. Co. vs. Dixon*, 139 F. 737, related to an accident occurring December 25, 1899, long before the enactment of the Federal statute here involved, and when the doctrines of contributory negligence and fellow-servant were in full effect. In fact, the non-application of *res ipsa* was based expressly by Judge Sanborn upon the existence of these defenses, now abolished. These early cases, the *O'Brien*, the *Cryder*, the *Dixon*, the *Patton* and the *Fulgham*, were cited by the same court in *American Car & Foundry Co. vs. Barry*, 195 F. 919. Then, in the later decision of the Eighth Circuit Court of Appeals in *Kaemmerling vs. Athletic Mining & Smelting Co.*, 2 F. (2d) 574, the early cases are discussed, explained and distinguished. It was said in the concurring opinion:

> "When the fellow-servant rule is abolished the doctrine of *res ipsa loquitur* may properly be applied as between master and servant."

The distinction between the cases where the doctrine has no application to this relationship and the cases where it does and may apply is clear and obvious to everyone, apparently, except petitioners' counsel. In an attempt to create a conflict between the decision in the case at bar and *Southern Ry. Co. vs. Stewart*, 119 F. (2d) 85, it is assumed by petitioners that the latter decision holds that the failure of a safety appliance to work properly constitutes no evidence of a defect or of negligence. The *Stewart* case holds nothing of the kind. The *Stewart* case holds that the operating efficiency of the appliance is the test to determine whether the law has been violated. In that case there was no evidence

that the deceased switchman had attempted to operate the appliance in the usual and customary manner. There was no evidence that anyone attempted to operate the appliance in the usual, proper and customary manner, but the Court indicated that had there been sufficient evidence that the appliance did not operate satisfactorily, a violation of the Act would have been shown. There is thus no conflict or inconsistency between the decision in the *Perry* case and the *Stewart* case.

Where wood is so rotten and metal so corroded that a car door weighing 400 pounds will fall from its attachments because a group of employees pull and push on it in the usual, proper, customary way—employees who in thirty years of experience never had it happen before—such occurrence, in the absence of explanation, permits of an inference that the workmen at originating terminals and on the rip track, who were employed and supplied with equipment for the purpose of discovering and remedying such defects, had not exercised due care.

3.

The Questions of Contributory Negligence and Assumption of Risk Were Properly Submitted to the Jury.

Smith, who climbed up on top, did not tell either respondent or Shewmon that the hanger was off (R. 156, 183, 190, 354). Even after being on top, Smith did not know the door was defective; he claimed he saw the hanger off but did not look to see what caused it (R. 363). Surely respondent could assume Smith would look carefully enough to find anything dangerous and would notify plaintiff and his co-employees. Shewmon did not expect an accident to happen and was not alarmed (R. 355-6); respondent did not believe there was any possibility of the door falling (R. 189).

The statement by petitioners' counsel that it conclusively

appears that it was respondent's duty to inspect the door and its appliances is false. Exactly the contrary is true (R. 76, 129, 133, 136, 345). Running inspections but not top inspections were made at Moberly (R. 124-8, 133).

Three days after the accident respondent stated to the claim agent, "Every day we close doors of this kind with a bar, and we always do it in the manner I was doing it, and we considered this a safe practice" (Defendants' Exhibit "B," R. 371).

That the accident was exceedingly rare (R. 39, 49, 55, 56, 70, 71, 180, 316); that it was not respondent's duty to inspect the tops of doors (R. 76, 129, 123), but was the duty of other employees in other places (R. 103, 124, 129, 133, 136, 205), has already been sufficiently covered.

The assertion that respondent may have pried the door loose and was wrenching and prying up at the moment of the accident is contrary to petitioners' own evidence (R. 349, 364; see, also, 157-8). Respondent did not and could not pry the door off the attachments (R. 66, 67, 70, 118, 272) even though one hanger is off the track (R. 77-8). He merely took up the slack and held the bar still so the other employees could close the door (R. 157, 158, 275, 276, 364) in the usual and customary manner (R. 39, 44, 65, 145, 146). When the door fell, three other men had to get out of the way first and respondent couldn't escape (R. 159). He couldn't possibly have seen the conditions from the ground (R. 363), even with his lantern (R. 73, 178, 179).

Hoff testified that you are handicapped at night, and even though the wheel was off the track you couldn't tell it from the ground (R. 73). Bell had a carbide light (R. 177). Respondent had an old type oil lantern with a reflector (R. 136-7); and the night was a dark one (R. 131).

Unless the evidence is clear and uncontradicted and from unimpeached witnesses, and is such that all reasonable men

must come to but one conclusion, the questions of contributory negligence and assumption of risk are for the jury.

Risks arising from the negligence of the master are not assumed in the absence of actual knowledge. Assumption of risk is an affirmative defense and the burden to establish it is on the master, and as said by Justice Holmes in *Schlemmer vs. Buffalo P. & P. R. Co.*, 205 U. S. 1, great care should be taken lest the servant's rights be sacrificed by charging him with assumption of risk under the name of contributory negligence. The authorities will be found under section 3 of Points and Authorities. We forbear any discussion of them for the reason that upon the record made we believe such questions are not properly before this Court. The only question, as noted by the Circuit Court of Appeals, is whether the doctrine of *res ipsa loquitur* was properly applied by the trial court, and we mention the subjects of assumption of risk and contributory negligence only because of the confusion arising from petitioners' injection of them into their brief.

V.

CONCLUSION

In the *Patton* case, upon which petitioners place such great emphasis, it was said:

> "Hence it is that seldom an appellate court reverses the action of a trial court in declining to give a peremptory instruction for a verdict one way or the other. * * * And if such judgment is approved by the proper appellate court, this court, when called upon to review the proceedings of both courts, will rightfully be much influenced by their concurrent opinions."

If this be true when the failure to direct a verdict is involved, how much more so should this principle govern a decision when nothing is involved except a rule of evidence,

res ipsa loquitur, which is usually called a mere procedural device. This Court is asked to issue a writ of certiorari and to review the decision below so that this case may be tried anew. The trial judge followed the ruling of this Court in *Southern Ry. Co. vs. Bennett*, 233 U. S. 80, which has definitely decided that *res ipsa loquitur* does and may apply to an action under the Federal Employers' Liability Act. Therefore, this question having already been determined by this tribunal in an important case that has been cited and followed in both State and Federal courts all over the country, the only purpose that could be served by a review of the case at bar would be to determine the applicability or the non-applicability of the doctrine to this case on its own special, factual background. The decision would thus be limited to the particular facts of this particular lawsuit.

It is respectfully submitted that the case was correctly determined in the courts below by the application of principles of law that are clear and well established, and in the light of the matters thus presented, the present application falls very short of the requirements prescribed by the rules of this Court governing the granting of Writs of Certiorari.

The petition should accordingly be denied.

Respectfully submitted,

WILLIAM H. DEPARCQ,
Attorney for Respondent,
1655-60 Rand Tower,
Minneapolis, Minnesota.

Of Counsel:
SAMUEL COHEN,
139 North Clark Street,
Chicago, Illinois.
WILLIAM R. KIRBY,
COX, BLAIR & KOOREMAN,
1200 Title Guaranty Building,
St. Louis, Missouri.